Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-04(W)-262–10 OF 2015 AND B-04(W)-281–10 OF 2015
HAMID SULTAN, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
7 NOVEMBER 2016

Evidence — Witness — Parties to civil suits — First respondent and second respondent involved in road traffic accident — First respondent brought action to claim damages from second respondent as well as appellant as second respondent's insurer — Whether first respondent could call second respondent as witness

Insurance — Accident insurance — Policy — First respondent and second respondent involved in road traffic accident — First respondent brought action to claim damages from second respondent as well as appellant as second respondent's insurer — Whether appellant could avoid liability under insurance policy — Whether second respondent's motorcar involved in accident with first respondent's motorcycle — Evidence Act 1950 ss 120 & 153

These appeals emanated from the decisions of the High Court in finding that the appellant and the second respondent were liable for the road traffic accident involving the first respondent ('the plaintiff in the sessions court') and the second respondent ('the first defendant in the sessions court'). The appellant in the present appeals was the insurer for the second respondent. In the trial before the sessions court and during the first respondent's case, the second respondent had been cross-examined and throughout such process, he maintained his involvement in the accident ('first version'). Nevertheless, when the case resumed for hearing, new evidence were introduced by him in the form of a statutory declaration ('exh D25') and a statement of adjuster ('exh D26') in which he denied his involvement in the accident ('second version'). Similarly, the second respondent's statement of defence contained his admission of the occurrence of the accident, but in his amended statement of defence, he pleaded that he was never involved in the accident at all. The second respondent also alleged that he was persuaded by his uncle ('PW11') and his uncle's friend ('PW8') to lodge a police report and to admit that he was involved in the said accident in order to help him but both PW8 and PW11 denied such allegations. It must be noted that there was no eye-witness as to how the accident happened, hence, at the trial stage, the first respondent had subpoenaed the second respondent to be his witness. At the end of the trial, the sessions court dismissed the first respondent's action against the second respondent and the appellant, however on appeal, the High Court reversed the

said decisions, hence the present appeals. The issues for court's determination were: (a) whether in the present suit which involved accident and insurance claim, the first respondent could call the second respondent as his witness; (b) whether the appellant could avoid liability under the insurance policy; and (c) whether the second respondent's motorcar was involved in the said accident with the first respondent's motorcycle.

Held, dismissing the appeals with costs:

(1) Under the law there is nothing that forbids a plaintiff from calling a defendant as a witness. Section 120 of the Evidence Act 1950 ('the Act') clearly provides that parties in civil proceedings are competent witnesses. In the present appeals, although the court was not condoning the conduct of the first respondent in calling the second respondent to give evidence on his behalf, but that was the position of law. Further, counsel for the appellant and the second respondent had not raised any objection when the second respondent took the stand as the first respondent's witness. Thus, there was no doubt of the ability of the second respondent under the law to become a witness of the first respondent (see paras 19 & 21).

(2) Even if the second respondent had breached the conditions of the policy, that did not give the appellant a right to avoid liability as against a third party such as the first respondent herein. There is a general principle that a claimant compelled by law to make a payment discharging the defendant's liability to a third party can recover that sum from the defendant (see para 23).

(3) The court agreed with the first respondent that the second version of the second respondent's evidence was clearly inadmissible by virtue of s 153 of the Act. Further, the second version only surfaced three years after the accident, in tandem with the second adjusters report, particulars whereof were not pleaded. As it was not pleaded, the court viewed the second version as narrated to the court must surely be suspect (see para 27).

(4) It was not disputed that the second respondent's amended statement of defence was filed by his solicitor without meeting or interviewing him. As the amended statement of defence of the second respondent was done without him knowing it, the validity of the amendment was also suspect. Hence the involvement of the second respondent in the accident could not be questioned. In any event, it is trite, the second respondent was bound by his pleading. His statement of defence, whether the original defence or the amended defence, never pleaded the facts as averred in exhs D25 and D26. In addition, the averment in exhs D25 and D26 was not raised by the first respondent but by the second respondent through his own counsel after being called for further cross-examination. Hence,

it became his new unpleaded defence which must be rejected by the trial court. By allowing this, the trial court had committed a serious error (see paras 28 & 30–31).

[Bahasa Malaysia summary

Rayuan ini berpunca daripada keputusan Mahkamah Tinggi dalam mendapati bahawa perayu dan responden kedua bertanggungan untuk kemalangan jalan raya melibatkan responden pertama ('plaintif di mahkamah sesyen') dan responden kedua ('defendan pertama di mahkamah sesyen'). Perayu dalam rayuan ini adalah syarikat insurans untuk responden kedua. Dalam perbicaraan di hadapan mahkamah sesyen dan sewaktu kes responden pertama, responden kedua telah diperiksa balas dan sepanjang proses itu, dia mengekalkan penglibatannya dalam kemalangan ('versi pertama'). Namun, apabila kes dimulakan semula untuk perbicaraan, keterangan baru telah dikemukakan olehnya dalam bentuk deklarasi statutori ('eksh 25') dan kenyataan adjuster ('eksh 26') yang mana dia menafikan penglibatannya dalam kemalangan ('versi kedua'). Bersamaan juga, kenyataan pembelaan responden kedua mengandungi pengakuan kejadian kemalangan, tetapi dalam kenyataan pembelaan terpindanya, dia memplidkan bahawa dia tidak pernah terlibat dalam kemalangan sama sekali. Responden kedua juga mendakwa bahawa dia telah dipujuk oleh pakciknya ('PW11') dan kawan pakciknya ('PW8') untuk membuat laporan polis dan untuk mengaku bahawa dia terlibat dalam kemalangan itu untuk membantunya tetapi kedua-dua PW8 dan PW11 menafikan dakwaan sebegitu. Mengambil kira bahawa tiada saksi menyaksikan tentang bagaimana kemalangan tersebut berlaku, maka, pada peringkat perbicaraan, responden pertama telah mensepina responden kedua untuk menjadi saksinya. Pada akhir perbicaraan, mahkamah sesyen menolak tindakan responden pertama terhadap responden kedua dan perayu, walau bagaimanapun semasa rayuan, Mahkamah Tinggi telah mengakaskan keputusan tersebut, maka rayuan ini. Isu untuk penentuan mahkamah adalah: (a) sama ada dalam guaman ini yang melibatkan kemalangan dan tuntutan insurans, responden pertama boleh memanggil responden kedua sebagai saksinya; (b) sama ada perayu boleh mengelak tanggungan di bawah polisi insurans; dan (c) sama ada kenderaan responden kedua terlibat dalam kemalangan dengan motosikal responden pertama.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah undang-undang tiada apa yang menghalang plaintif daripada memanggil defendan sebagai saksi. Seksyen 120 Akta Keterangan 1950 ('Akta') jelas memperuntukkan bahawa pihak dalam prosiding sivil adalah saksi kompeten. Dalam rayuan ini, walaupun mahkamah tidak memaafkan perilaku responden pertama memanggil responden kedua untuk memberi keterangan bagi pihaknya, tetapi itu adalah kedudukan undang-undang. Selanjutnya, peguam untuk perayu dan responden

kedua tidak membangkitkan apa-apa bantahan apabila responden kedua memberi keterangan sebagai saksi responden pertama. Oleh itu, tiada kesangsian terhadap kemampuan responden kedua di bawah undang-undang untuk menjadi saksi kepada responden pertama (lihat perenggan 19 & 21).

(2) Jika pun responden kedua telah melanggar syarat-syarat polisi, itu tidak memberikan perayu hak untuk mengelak tanggungan terhadap pihak ketiga seperti responden pertama di sini. Terdapat prinsip am bahawa seorang penuntut dikehendaki oleh undang-undang untuk membuat bayaran melepaskan tanggungan defendan terhadap pihak ketiga, boleh mendapatkan semula jumlah itu daripada defendan (lihat perenggan 23).

(3) Mahkamah bersetuju dengan responden pertama bahawa versi kedua keterangan responden kedua adalah jelas tidak boleh diterima menurut s 153 Akta. Selanjutnya, versi kedua hanya timbul tiga tahun selepas kemalangan, bersama-sama dengan laporan adjuster kedua, butiran yang mana tidak diplidkan. Memandangkan ia tidak diplidkan, mahkamah menganggap versi kedua sebagaimana yang diceritakan kepada mahkamah sudah tentu akan dicurigai (lihat perenggan 27).

(4) Tidak dipertikaikan bahawa kenyataan pembelaan responden kedua telah difailkan oleh peguamcaranya tanpa berjumpa atau menemu bualnya. Oleh kerana kenyataan pembelaan terpinda responden kedua dilakukan tanpa pengetahuannya, kesahan pemindaan juga turut dicurigai. Maka penglibatan responden kedua dalam kemalangan tidak boleh dipersoalkan. Dalam apa-apa kejadian, tidak dipertikaikan, responden kedua adalah terikat dengan plidingnya. Kenyataan pembelaan, sama ada pembelaan asal atau pembelaan terpinda, tidak pernah memplidkan fakta seperti yang ditegaskan di dalam eksh D25 dan D26. Tambahan lagi, penegasan di dalam eksh D25 dan 26 tidak dibangkitkan oleh responden pertama tetapi oleh responden kedua melalui peguamnya selepas dipanggil untuk pemeriksaan balas lanjutan. Maka, ia menjadi pembelaan baharu yang tidak diplidkan yang perlu ditolak oleh mahkamah perbicaraan. Dengan membenarkan ini, mahkamah perbicaraan telah melakukan kesilapan besar (lihat perenggan 28 & 30–31).]

Notes

For cases on accident insurance in general, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1–18.

For cases on witness in general, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3370–3710.

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623; [1996] 2 CLJ 455, HC (refd)
Groom v Crocker [1939] 1 KB 194, CA (refd)
Koh Yat Chong & Anor v Koh Chin Lean Plantation Sdn Bhd & Ors [2015] MLJU 379; [2015] 7 CLJ 468, HC (refd)
London Guarantie Co v Fearnley (1880) 5 App Cas 911, HL (refd)
M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Ng See Hem v Lim Ah Hooi [1950] 1 MLJ 280, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672, CA (refd)

Legislation referred to

Evidence Act 1950 ss 120, 153
Evidence Ordinance 1950 s 114
Road Transport Act 1987 s 95
Rules of Court 2012 O 20 r 5

Appeal from: Civil Appeal No 12B-45–02 of 2015 (High Court, Shah Alam)

C Manimaran (VP Nathan & Partner) in Civil Appeal No B-04(W)-262–10 of 2015 for the appellant.
Jagjit (Jagjit Singh & Co) in Civil Appeal No B-04(W)-281–10 of 2015 for the appellants.
M Manoharan (M Manoharan & Co) in Civil Appeal Nos B-04(W)-262–10 of 2015 and B-04(W)-281–10 of 2015 for the first respondent.
C Manimaran (VP Nathan & Partner) in Civil Appeal No B-04(W)-281–10 of 2015 for the second respondent.
Jagjit (Jagjit Singh & Co) in Civil Appeal No B-04(W)-262–10 of 2015 for the second respondent.

Zaleha Yusof JCA:

[1] These two appeals are against the decision of the High Court at Shah Alam which had on 17 September 2010 set aside the order of the Sessions Court at Klang dated 28 January 2015 and held that Tokio Marine Insurance (M) Bhd ('Tokio Marine') and Tamil Selvam a/l Ganesan ('Tamil Selvam') were liable for the road traffic accident involving Rathakrisnan a/l Ramatasu ('Rathakrisnan') and Tamil Selvam.

[2] Tokio Marine is the insurer for Tamil Selvam. Rathakrisnan had brought a suit at the sessions court and claimed for damages, as a plaintiff, against Tamil Selvam, as a defendant, in respect of the said road traffic accident which had

occurred on 22 June 2011 at Jalan Pelabuhan Utara, Klang. Tokio Marine had filed an application to intervene in the suit and the application was allowed on 10 October 2013. Consequently, Tokio Marine was cited as the second defendant in the suit.

[3] The sessions court had dismissed Rathakrisnan's suit against Tamil Selvam and Tokio Marine. However, on appeal (only on issue of liability) the decision of the sessions court was reversed, hence the appeals before us now filed by Tokio Marine and Tamil Selvam separately. For ease of convenience and for the purpose of this judgment, the parties will be referred to as they were at the sessions court.

[4] The plaintiff had, as a result of the accident, skull fracture with severe head injury and could not remember the details of the accident. Therefore the plaintiff had subpoenaed the first defendant to be his witness, PW9.

[5] It is not disputed that there was no eyewitness as to how the accident happened. The only other witness who was at the scene of the accident and called as a witness was PW7. However, PW7 too did not witness the accident. When he reached the scene, he saw the plaintiff lying unconscious near his motorcycle and not far therefrom was the purported motorcar of the first defendant which immediately left the scene. However PW7 managed to note down the number of the motorcar on a piece of paper and using the plaintiff's handphone, spoke to the plaintiff's brother, PW8 about the accident and what he saw. A few days later, PW7 met with PW8 and handed over to him the piece of paper. PW8 had on the same night of the accident lodged a police report about the accident.

[6] Three weeks later, PW8 managed to trace the owner of the motorcar ie the first defendant. PW8 met with the first defendant and the first defendant admitted his involvement in the accident.

[7] Therefore, PW8 urged the first defendant to lodge a police report. On the next day, 3 August 2011, PW8 lodged another police report detailing the call he received from PW7 at the night of the accident, his meeting with the first defendant and the first defendant's involvement in the accident. The first defendant lodged a police report on the accident on the following day, 4 August 2011.

[8] From the notes of evidence, it is shown that during the plaintiff's case on 27 August 2014, the first defendant had been cross-examined at length by counsels for both the first and second defendants. Throughout, he maintained his involvement in the accident. Although he was cross-examined strenuously, he did not depart. However when the case was resumed for continued hearing

on 11 November 2014, the plaintiff was present in person as his counsel had discharged himself. The court had allowed the first defendant's counsel's request for the first defendant, PW9, to be recalled for further cross-examination. Two new evidence were introduced in the form of a statutory declaration exh 'D25' and a statement to adjuster exh 'D26'; in which the first defendant stated that his motorcar was never involved in a collision with the plaintiff's motorcycle on the day and time and at the place stated.

[9] In D25 and D26, the first defendant alleged that his own uncle named Encik Nathan had meet with him together with his uncle's friend, PW8, and persuaded him to lodge a police report and to admit that he was involved in the said accident, in order to help the plaintiff. The first defendant said he was promised RM30,000 by PW8 if he agreed to do so.

[10] Consequently, PW8 was recalled by the plaintiff for further examination. He denied having known Encik Nathan and having made such offer of RM30,000.

[11] Encik Nathan was also subsequently subpoenaed by the plaintiff to give evidence as PW11. He denied that he was the first defendant's uncle or having any relationship with him and denied knowing the first defendant. He also disputed that the meeting, as averred by the first defendant in D25 and D26, ever took place.

OUR DISCUSSION AND DECISION

[12] The main issue in these appeals is whether the first defendant's motorcar was involved in the said accident with the plaintiff's motorcycle. If the answer is in the affirmative, the next issue is whether the second defendant can avoid liability under the insurance policy. However before we discuss the issues, the first question that came to our minds was whether in this kind of suit which involved accident and insurance claim, the plaintiff can call the defendant as his witness.

[13] Learned counsel for the second defendant, the insurer, had cited conditions 2(e) and (f) of the private car policy which read as follows:

> Condition 2(e):
>
> > No negotiation, admission or repudiation of any claim may be entered into without our prior written consent.
>
> Condition (f):
>
> > We shall have full discretion in the conduct, defence and/or settlement of any claim.

[14] He also cited condition 7 which reads as follows: A

> Condition 7:
>
> This policy will only be operative if:
>
> (a) Any person claiming protection has complied with all its Terms, Conditions, Endorsements, Clauses or Warranties. B

[15] He submitted that if an insurance company is to be entitled to disclaim liability for breach of a condition, the insurance company must make the condition a condition precedent as stated in the case of *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 as follows: C

> Where a condition in a policy is stipulated to be a condition precedent, the insurers were under no liability under the policy unless that condition has been complied with.

D

[16] He further submitted, reading conditions 2(e) together with condition 7 clearly indicates that condition 2(e) is a condition precedent to any liability that may arise under the policy. Therefore, he contended, in the present case, the second defendant by testifying for the first respondent and initially admitting to his negligence without the appellant's written consent had clearly breached condition 2(e). Further, by giving evidence as PW9 for the first respondent without consulting the appellant's lawyer and insurer's appointed lawyer, the second respondent had also breached condition 2(f). E

F

[17] Learned counsel for the plaintiff on the other hand submitted that there was no impediment in calling the first defendant as a plaintiff's witness based on s 120 of the Evidence Act 1950 and also based on the cases of *Ng See Hem v Lim Ah Hooi* [1950] 1 MLJ 280; *M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 and *Koh Yat Chong & Anor v Koh Chin Lean Plantation Sdn Bhd & Ors* [2015] MLJU 379; [2015] 7 CLJ 468. G

[18] We have considered carefully submissions made by the parties on this issue. With due respect, we are of the view that the provisions of the private car policy and the case authority cited by learned counsel for the second defendant in his submission only show the contractual relationship or obligation between the parties. It does not help us to answer the issue posed. H

[19] On the other hand we have examined s 120 of the Evidence Act 1950 and perused the cases cited by learned counsel for the plaintiff. It is clearly true that s 120 provides, inter alia, that in all civil proceedings the parties to the suit should be competent witnesses. In *Ng See Hem*'s case, the Court of Appeal had held that although the plaintiff at the trial could have called the second I

defendant as his witness, his failure to do so could not raise any presumption under s 114 of the Evidence Ordinance 1950 as the second defendant had admitted his joint liability. At p 282 of the report Pretheroe Ag CJ stated:

> There remains one other point. It has already been stated that the second defendant was in court during the hearing but was not called as a witness. Mr Shearn submitted that under s 114 of the Evidence Ordinance 1950, the trial judge should have presumed that his evidence would have been unfavourable to the plaintiff. At first I entertained some doubt as to *whether the plaintiff could call a defendant as his own witness, but this doubt was unfounded* (*Price v Manning* 42 Ch D 372). *However, the facts of this case rebut any such presumption, as the second defendant had already admitted his joint liability to pay the plaintiff $60,000*.

[20] In *M Ratnavale*, Hashim Yeop Sani SCJ (as His Lordship then was) had this to say at pp 379–380:

> At this juncture, it may be useful to consider the point of procedure raised by both parties with regard to the calling of both the appellants as witnesses for the respondent after what Encik Thomas referred to as 'conditional close of the plaintiff's case'. On looking at the record, we notice that the respondent, as plaintiff in the court below, closed her case after the evidence of PW4. But Encik Thomas gave notice that in the event that the defendants should elect not to give evidence he would call them as witnesses for the plaintiff. Counsel for the first appellant then (not Mr Chelliah) did not object and the case was reopened and the first appellant became a witness for the plaintiff.
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> ...
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> Then the attempt by Encik Thomas to call the second appellant as witness for the plaintiff was met with vigorous objection by Encik Sri Ram. There were arguments about the propriety of calling the second appellant under the circumstances but the objection by Encik Sri Ram was overruled by the learned judge. The second appellant gave evidence but proved to be a difficult witness and Encik Thomas had to treat him as a 'hostile' witness.
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> The cases cited on the calling of the opposite party as witness were ordinary civil cases — *Price v Manning* and *Barker v Furlong*, the standard of proof required being proof on the balance of probability.
>
> There is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter should be left to the discretion of the trial judge according to the circumstances of the case.
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> As a matter of practice, this is of course seldom done for the simple reason that when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence the plaintiff runs a risk every time he elects to take such a course of action.

[21] From the authorities above, we are satisfied that under the law there is nothing that forbids a plaintiff from calling a defendant as a witness. Although those cases cited had nothing to do with insurance claim, the position, in our view, cannot be different. Especially so when s 120 of the Evidence Act 1950

clearly provides that parties in civil proceedings are competent witnesses. Although we are not condoning the conduct of the plaintiff in calling the first defendant to give evidence on his behalf, but that is the position of the law. If the plaintiff elects the defendant as his witness, he runs a risk if for example the defendant turns out to be a hostile witness. From the notes of proceedings we also observe, that none of the counsels for the defendants had raised any objection when the first defendant took the stand as the plaintiff's witness, PW9. We therefore have no doubt of the ability of the first defendant under the law to become a witness of the plaintiff.

[22] Now the next issue is whether the second defendant can avoid liability under the policy. Learned counsel for the second defendant had cited certain provisions of the private car policy to show that the first defendant had breached the condition precedent of the policy and that is sufficient for the second defendant as an insurer to avoid risk under the policy.

[23] Unfortunately the whole policy was and is not before us. Be that as it may, it is our view, even if the first defendant had breached the conditions of the policy, that does not give the second defendant a right to avoid liability as against a third party such as the plaintiff herein. There is a general principle that a claimant compelled by law to make a payment discharging the defendant's liability to a third party can recover that sum from the defendant (see s 95 of the Road Transport Act 1987, *Birds' Modern Insurance Law* (9th Ed) p 427 and *The Law of Motor Insurance* Sweet and Maxwell (1st Ed) p 376 paras 5–149).

[24] It was also the defendants' case that there was conflicting evidence in the plaintiff's case. It was submitted that the plaintiff's case depended heavily on the testimony of the first defendant as PW9. However PW9 had given conflicting evidence. At first, he admitted that there was a collision between his motorcar and the plaintiff's motorcycle. However subsequently, on being recalled for further cross-examination, he testified that his police report was a false report and that the truth was as contained in exhs D25 and D26, that his motorcar was never involved in a collision with the plaintiff's motorcycle. He testified that he was offered a bribe of RM30,000 by the plaintiff's brother, PW8, to lodge the false police report claiming his involvement in the accident. As there was this conflicting and inconsistent evidence of PW9, the plaintiff's suit ought to be dismissed as the plaintiff had failed to prove negligence against the first defendant. For the second defendant it was further submitted that the first defendant was not a credible witness.

[25] On this issue, we had been referred to by learned counsel for the plaintiff the provision of s 153 of the Evidence Act 1950. It states as follows:

> When a witness has been asked and has answered any question which is relevant to the inquiry only so far as it tends to shake his credit by injuring his character, no

A evidence shall be given to contradict him; but if he answers falsely he may afterwards be charged with giving false evidence.

[26] It was submitted by the plaintiff that the second version of the first defendant's evidence, when he was recalled for further cross-examination, is B clearly inadmissable by virtue of the said s 153. It is clearly an attempt to bring in fresh evidence to bolster up the pleaded case of the defendants that has collapsed through the first version of the first defendant.

[27] To this, we agree. Section 153 of the Evidence Act 1950 clearly states C that when a witness has been asked and has answered any questions which is relevant to the inquiry, no evidence shall be given to contradict him. PW9, the first defendant, had been subjected to vigorous cross-examination by both counsel for the first and second defendants respectively when he gave his first version. He maintained his story, throughout that there was indeed a collision. D In fact the second version was rebutted through the evidence of SP8 and SP11. As submitted by learned counsel for the plaintiff, the second version of the first defendant only surfaced three years after the accident, in tandem with a second adjusters report, particulars whereof were not pleaded. As it was not pleaded, we view his second version as narrated to the court must surely be suspect (see E *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623; [1996] 2 CLJ 455).

[28] As we touch the subject of pleading, we also observe that the statement F of defence filed by the first defendant on 5 March 2013 contained his admission that there was indeed a collision between the first defendant's motorcar and the plaintiff's motorcycle. However in his amended statement of defence which was filed pursuant to the court order dated 15 January 2014, the first defendant pleaded that he was never involved in the accident at all. G Ironically, and this was not disputed, the first defendant's amended statement of defence was filed by his solicitor without meeting or interviewing him. On this issue of pleading filed by the solicitor without the first defendant being consulted, we are attracted to the case of *Groom v Crocker* [1939] 1 KB 194 (CA) wherein Scott LJ at p 223 had this to say:

H Under condition 2 the society were given, in consideration of their indemnity, an absolute right to control their assured's defence; but the scope of this right was, in my view, subject to certain boundaries and limitations. It was not one which they would be entitled to exercise arbitrarily. They were bound to exercise a real discretion upon each question as it arose in the conduct of the defence, making each I decision after due consideration of the circumstances of the particular case; not, of course, consulting the wishes of the assured as if he were an uninsured person, but taking their decisions with their minds on the facts of the particular allegations made against him, whilst not forgetting their own rights arising from the bargain expressed in the policy – namely, that in return for his indemnity their assured allowed them freedom to deal with the pecuniary risk to which they were exposed as

> economically for themselves as they could without bringing into the account extraneous considerations wholly foreign to the subject-matter of the insurance between him and them. It is easy to see, even within a field of discretion so defined, that a great sense of moral grievance might still caused to an assured, as, indeed, the learned judge felt. Let me suppose the case either of a private chauffeur, or a lorry driver engaged continually in commercial transport on the roads, in either case a man of unblemished road reputation. The insurance company settles the case without consulting the employer. His driver knows he was guilty of no negligence, and the employer knows it, too. The driver feels that his good reputation has been sacrificed. Very hard cases happen in this way sometimes. It is, however, not necessary for this appeal to express any opinion on the difficult question of whether on such facts the assured would have legal ground for complaint, for the facts of the present case do not leave room for doubt; they fall wholly outside the field of discretion entrusted to the society by condition 2. The society here in making their profitable bargain with the Motor Union were acting as much outside that discretion as if they had accepted a bribe from a stranger in consideration of their instructing the appellants to put upon the record in Aubrey's action an admission of the respondent's negligence. The inclusion of the other action in which the respondent had no interest whatever, as a circumstance material to the exercise of their discretion, of itself imported a failure to exercise the discretion which by the contract they had undertaken to exercise, and was therefore a breach of their contract, and that initial breach invalidated the whole of their consequent instructions to the appellants. The policy conferred upon them no right to call upon the appellants to act on their mandate, and the appellants derived no authority from it to do what they did. The consequences are plain. The appellants were acting from first to last in breach of their contractual duty to the respondent. First, they were repudiating the very existence of the relationship of solicitor and client between themselves and the respondent which was constituted by the nomination of the society; secondly, they were acting on orders which the society had no right to give, and taking action with which they knew their client did not agree; and, thirdly, they did not inform him, or consult with him, or give him an opportunity to challenge the right of the society to give the instructions they had given, or, if need be, to intervene and conduct the defence of the case himself at his own expense.

[29] We cannot agree more with the above decision. It is common knowledge that a solicitor for a defendant in an accident claim is nominated by the insurance company. Although the defendant is his client, he ie the solicitor is also appointed to protect the interest of insurance company. Condition 2 cited by *Groom*'s case, is similar with condition 2(f) cited by learned counsel for the second defendant in this instant case. Although the second defendant as an insurer has 'full discretions in the conduct, defence and/or settlement of any claims', the relationship between the solicitor as appointed and the first respondent, as his client cannot be ignored as the first respondent has the right to be informed and consulted on how the case to be conducted. On the special facts of the case, we are not prepared to condone the conduct of the first defendant's solicitor acting on the instruction of the second defendant, had amended the first defendant's statement of defence without obtaining

instruction from the first defendant. This amendment was also inconsistent with the first defendant's police report. We are of the view, this amendment and the conduct relating to the amendment as well as the evidence in court do not promote administration of justice. The first defendant as an insured, cannot be treated, to use the words of Mac Kinnon LJ in *Groom*'s case, 'as a mere pawn in the game of' the insurer and the claimant.

[30] As the amended statement of defence of the first defendant was done without him knowing it, we feel the validity of the amendment is also suspect. Hence the involvement of the first defendant in the accident cannot be questioned. In any event, it is trite, the first defendant is bound by his pleading. His statement of defence, whether the original defence or the amended one, never pleaded the facts as averred in exhs P25 and P26. On this, we refer to the Federal Court's decision in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 as follows:

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'.
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> [30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC)).
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> [31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also *Haji Mohamed Don v Sakiman* [1956] 1 MLJ 45; and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99).
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> [32] Based on the above observation and principle, we are of the view that the 'last minute' issue raised by Mr Gobind Singh Deo, co-counsel for the appellant, that at the time when the sale and purchase agreements with the earlier purchasers were executed, MPM was not the registered proprietor/owner of the land must be disregarded and not to be considered at all in determining the appeal before us. In doing so, we adopt the observation by HRH Raja Azlan Shah CJ (as HRH then was) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10:
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> > As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be a great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case.

[34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, '... once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an unpleaded case ...'.

[31] Following the above authority, if the averment in D25 and D26 are indeed the truth, what the first defendant should have done was to reamend his statement of defence to plead the fact and issue averred as such. This is of course the right thing to do as it is allowed by O 20 r 5 of the Rules of Court 2012. Otherwise it was wrong for the trial judge to accept this evidence. We bear in mind, although this was raised during the plaintiff's case, it was not raised by the plaintiff but by the first defendant through his own counsel after being recalled for further cross-examination. Hence it became his new unpleaded defence which must be rejected by the trial court. By allowing this, we are of the opinion that the trial court had committed a serious error.

[32] The second defendant in its defence had also pleaded that there was no such collision between the first defendant's motorcar and the plaintiff's motorcycle or alternatively there were elements of fraud (*unsur-unsur fraud*) involved. It also pleaded that there was a collusion between the first defendant and the plaintiff, that the claim was a false claim and the police report lodged by the first respondent was false.

[33] As can be seen above, we have already made a conclusion that the accident involving the said two vehicles did occur and that there was no evidence based on the pleadings, that the police report filed by the first defendant was a false report. Even the investigating officer, PW3, had given evidence that the first respondent had admitted his involvement in the accident and there was also damage to his motorcar. We also find that the statement of defence of the second defendant does not particularise what are the alleged fraud. It is important to give the particulars as the effect of the particulars is that the issues of fraud to be tried by the court are circumscribed by the particulars. See *M Ratnavale*. This court in *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672 had stated the following:

[24] Order 18 r 7(1) of the Rules requires a party to state the pleadings in the form of skeletal statement of facts sufficient to identify the matters complained of to enable one to establish one's case at the trial based on what is pleaded. To satisfy the rule on pleadings, the appellant was accordingly required to plead 'material facts' necessary for his defence and counterclaim. *On the issue of fraud, O 18 r 8(1) of the Rules requires fraud to be specifically pleaded*. There is good reason for doing so. It is

so as not to take the other party by surprise. In *Associated Leisure Ltd & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 Lord Denning said:

> ... *it is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it*.

On the non-particularisation of fraud, the Federal Court in *Tan Chwee Geok v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 191 ruled that:

> *Before a plea of fraud is put on record, it is the duty of counsel to insist on being fully instructed in the matter. Such a plea should never be pleaded on flimsy material.*

[25] The non-particularisation of the allegation of fraud by the appellant in this case was clearly fatal. The admission by the appellant of the discovery of fraud being 'recent' and 'investigation is still on going' is against the Rules and not in accord with the principles which has been firmly established. Paragraphs 1 and 2 as pleaded in the statement of defence and counterclaim were clearly insufficient on the issue of fraud.

[34] We are of the view that para 7 of the second defendant's statement of defence is clearly inadequate on the issue of fraud. Therefore the second defendant's contention of fraud is, with due respect, in our opinion, totally misplaced. The trial court had found that even the plaintiff had admitted fraud based on the new evidence adduced. But as indicated earlier, we have ruled that the admission of new evidence by the trial court was wrong.

CONCLUSION

[35] Based on the aforesaid, we find that there is no merit in these two appeals. Issues raised have clearly been explained and answered above that we need not repeat them. The learned High Court judge in our view had also dealt with all issues extensively and we cannot find any serious error that would require appellate intervention. We therefore dismiss these appeals with cost to be born by the second defendant.

Appeals dismissed with costs.

Reported by Dzulqarnain Ab Fatar